No. 619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION and GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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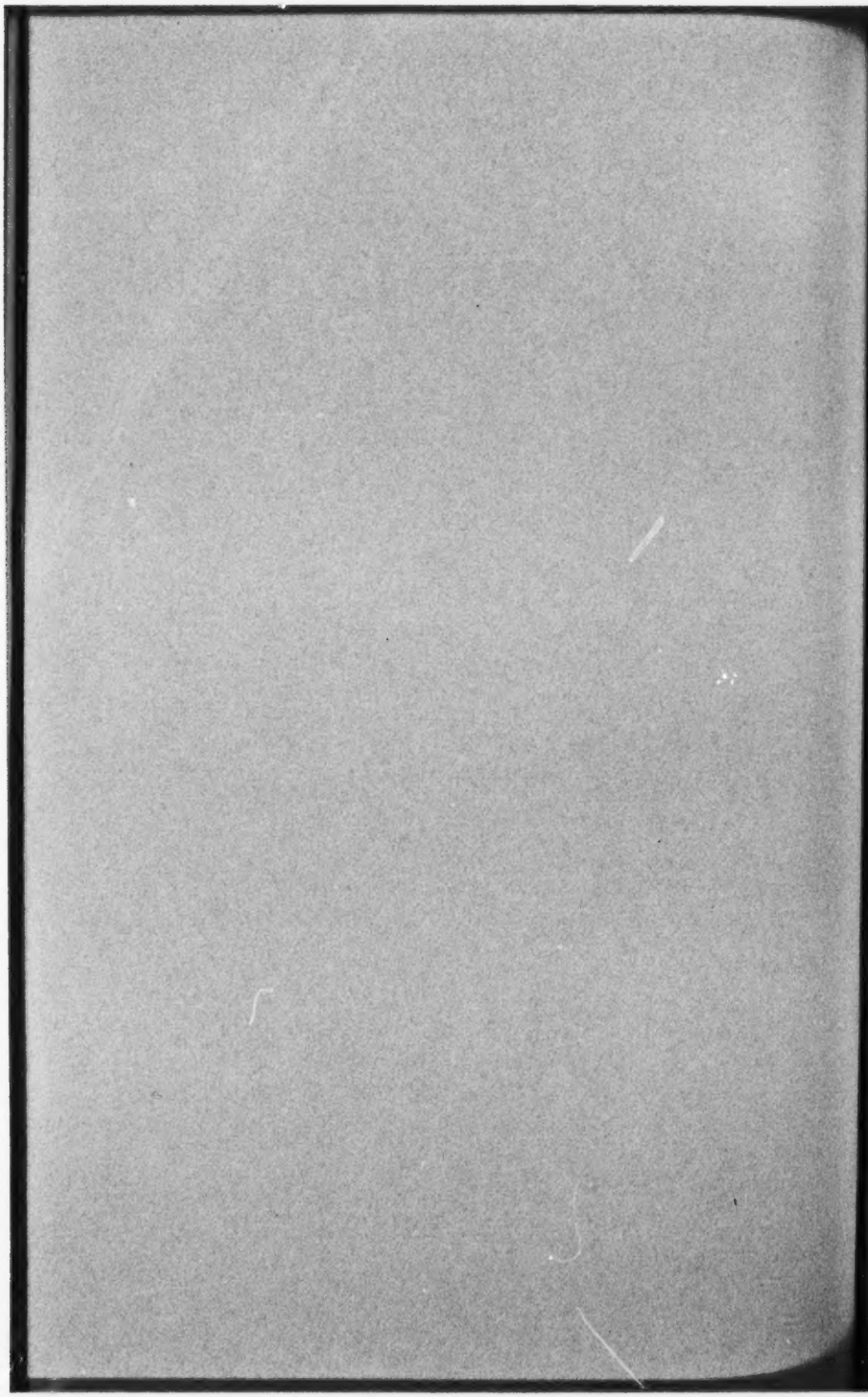
THE COURT PRESS, N. Y. C.



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—against—

FEDERAL TRADE COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOHN THOMAS SMITH, on behalf of General Motors Corporation, General Motors Sales Corporation and General Motors Acceptance Corporation, prays that a Writ of Certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in this cause on September 13, 1940, affirming an order of the Federal Trade Commission requiring the Petitioners to cease and desist from a certain unfair method of competition.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 747) is reported in 114 F. (2d) 33.

JURISDICTION.

The decree of the Circuit Court of Appeals for the Second Circuit was entered September 13, 1940 (R.

757). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sec. 5 of the Federal Trade Commission Act, as amended, U. S. C. Title 15, Sec. 45.

Questions Presented.

1. Does the power of the Federal Trade Commission to regulate unfair methods of competition in commerce extend to advertising of a corporation not engaged in commerce, by reason of the fact that its capital stock is owned by another corporation engaged in commerce in a different activity.

2. Does the Federal Trade Commission's power of regulation for the protection of the unwary, trusting or ignorant against statements which are false extend to statements which are true as well as reasonably informative.

Statute Involved.

The statute involved is the Federal Trade Commission Act, enacted September 26, 1914, c. 311, 38 Stat. 717, U. S. C. Title 15.[1] The pertinent provisions of the Act are:

> "Sec. 4. The words defined in this section shall have the following meaning when found in this act, to wit:
>
> " 'Commerce' means commerce among the sev-

[1] This proceeding was instituted by the Commission before the Act was amended March 21, 1938, c. 49, 52 Stat. 111, U. S. C. Supp. v., Title 15, Secs. 41 *et seq.* The amendments are not pertinent to the questions here presented.

eral States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * * * * * * *

"Sec. 5(a) Unfair methods of competition in commerce are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

Statement.

(For convenience, in referring to the Petitioners, the name of General Motors Acceptance Corporation will be abbreviated to "GMAC", and General Motors Corporation will be referred to as "General Motors".)

1. *Jurisdiction.* GMAC is a New York corporation organized in 1919 under the Investment Companies sections of the New York Banking Law. It finances retail instalment sales by dealers in products of General Motors manufacture by purchasing from them, at a discount, the instalment sale contracts acquired as a result of sales to retail buyers on the instalment plan (R. 177). This activity is conducted at GMAC branch offices in nearly all the states. Contracts are purchased at each office from such General Motors dealers as elect to do business with it

under the GMAC finance plan which is issued to dealers who do or contemplate doing business with GMAC. By its purchase of executed contracts from the dealer, GMAC becomes the owner of the retail buyer's obligation for the balance of the time price remaining to be paid. Its relations with the retail buyers do not extend beyond those pertaining to the collection of instalments payable under the contracts or the enforcement of rights in the event of default. In this connection, the Federal Trade Commission found that (R. 21, 22):

> "Its credit facilities are made available to retail purchasers by furnishing a ready means whereby the retail dealer may dispose of the instalment contracts given him by retail purchasers. By this process the retail purchaser may contract to buy a car manufactured by General Motors on a deferred payment basis. The dealer in turn is at liberty to assign this contract to GMAC, if acceptable to that company, and receives the approximate value therefor, whereupon GMAC collects the monthly installments from the retail purchaser as they become due. GMAC functions exclusively in connection with sales negotiated by authorized dealers in cars manufactured by General Motors except as to used cars of other makes taken by those dealers in trade."

Concerning finance activities on the part of one of GMAC's competitors (R. 113), this Court has said in *Hemphill* v. *Orloff*, 277 U. S. 537:

> "* * * Such business is not interstate commerce. *Nathan* v. *Louisiana*, 8 How. 73; *Paul* v. *Virginia*, 8 Wall. 168; *Hatch* v. *Reardon*, 204

U. S. 152, 162; *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436, 443."[1]

Accordingly, GMAC challenged the Federal Trade Commission's jurisdiction and power to regulate its activities and, specifically, the advertising practice which provoked this proceeding (R. 15).

The Federal Trade Commission, consistent with the theory of its case, conceded before the Circuit Court of Appeals, and that Court recognized (R. 756) that, considered by itself, GMAC was not engaged in commerce so as to subject it to the Commission's jurisdiction.

The claim of jurisdiction on the part of the Federal Trade Commission over GMAC stems from the fact that its capital stock is owned by General Motors, which caused it to be organized as a finance company (R. 21). General Motors, a Delaware corporation since 1916, is engaged in the business of manufacturing automobiles, as well as other products. It sells the products it manufactures to General Motors Sales Corporation, whose stock it owns and GM Sales ships and sells the products manufactured by General Motors at wholesale to retail dealers in those products in the various states (R. 56, 59). The dealers then sell them locally to the retail buyers (R. 22, 24).

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[1] Other activities were held similarly not to constitute interstate commerce, in *Ware & Leland* v. *Mobile County*, 209 U. S. 405 (Brokers taking orders and transmitting them to other states for the purchase and sale of cotton); *U. S. Fidelity & Guar. Co.* v. *Kentucky*, 231 U. S. 394 (Credit information bureau and service across state boundaries); *Hopkins* v. *U. S.*, 171 U. S. 578 (Stockyard cattle brokers as agents on commission, buying and selling cattle and making advances on the security of the cattle consigned to them); *Fed. Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs, et al.*, 259 U. S. 200 (Professional Baseball); *Standard Home Co.* v. *Davis, State Bank Com'r, et al.*, 217 Fed. 904 (Investment Company).

Because, by acquiring and handling instalment sale contracts purchased from General Motors dealers, GMAC is associated with retail sales by General Motors dealers, GMAC's activities were considered as part of a unified plan of business conducted by General Motors and as falling into the flow of commerce represented by the progress of General Motors products from manufacture to the local dealers for resale. This was on the ground that, while GMAC was "organized primarily as a finance company", the effect as well as the purpose of the GMAC advertising complained of was to further and promote the sale of cars of General Motors manufacture to the purchasing public. Those facts constitute the predicate of the Commission's position, asserted in purported findings of fact as well as in its complaint, that GMAC is the subsidiary medium through which General Motors conducts the finance activities which promote the sale of products which it manufactures (R. 3, 20, 31).

Sustaining the Commission's position, the Circuit Court of Appeals held that GMAC was engaged in interstate commerce because it was wholly owned by General Motors and was its agent in a unified plan of selling and financing cars shipped in interstate commerce (R. 756).

This results in a category of commerce compounded of stock ownership of the corporation whose activities are in question by a corporation engaged in commerce, and of the indirect connection of the subsidiary, as an incidence of the pursuit of its activities, with the manufacturing and wholesale distribution enterprise. Thus, what had not been commerce, becomes commerce by obliteration of all functional differences and by joining two different activities, not on the basis that the GMAC finance business affects the commerce in

which the manufacturer is engaged any more than the business of any other finance company would, but rather because their stock relationship creates an economic unity of enterprise which reduces GMAC to an agent under a unified plan of selling and financing.

The authority for the principle stated by the Circuit Court of Appeals was said to be found in this Court's decision in *Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U. S. 112, 120, but it is of the essence of this petition that this Court there dealt with no principle applicable to the situation here under discussion. The question of the necessity or propriety in an order issued by the Commission of including persons who are active in the management of the corporation against whose unfair practices the order is issued, presupposes that the corporation charged with the unfair practices is in commerce and subject to the Commission's jurisdiction. It would be pertinent only if GMAC were in commerce and if it were a question of including General Motors in the Federal Trade Commission order on the ground that, contrary to the facts in this case, it participated in the management of GMAC, in addition to its ownership of GMAC stock. It has no bearing whatever on the question whether a corporation which is not in commerce is subject to the jurisdiction of the Federal Trade Commission by reason of its stock relationship with a corporation which is in commerce. Substantially the same observations applied to the decision in *National Harness Mfrs'. Ass'n* v. *Fed. Trade Com.*, 268 Fed. 705, 709 (C. C. A. 6), also mentioned by the Circuit Court of Appeals.

General Motors was not itself engaged in the finance

business, nor did General Motors and GMAC have any officers in common, although they had some directors in common (R. 741, 742). None of the advertising against which the Commission proceeded, as an unfair method of competition, was done by General Motors. The only reason for including General Motors in the proceeding was to make its ownership of the GMAC capital stock serve as the unifying medium, by which the Federal Trade Commission purports to borrow from the commerce in which General Motors is engaged, to convert GMAC's finance business into commerce.

2. *Unfair Advertising Practice.* The GMAC practice against which the Federal Trade Commission proceeded as an unfair method of competition in commerce was a series of advertisements published by GMAC in national periodicals and newspapers of general circulation. It announced with a detailed explanation a ~~reduced finance cost~~ reduction in the finance cost of approximately 25% under a 6% Plan available with respect to retail instalment purchases. Besides the reduction in cost, the plan enabled the instalment buyer to make his own calculation of the finance charge that would be added by a dealer as part of the time price if the purchaser made an instalment purchase from a dealer where the GMAC finance plan was available. Theretofore the finance charge had been concealed from the public, lumped with other charges. The Commission charged the advertisements with the capacity and tendency to mislead and deceive the purchasing public into the erroneous belief that the 6% finance cost, as advertised, contemplated and amounted to a simple interest charge of 6% per annum on the unpaid balance of the total time price.

The initial advertisement was conceded to be similar to other and subsequent GMAC advertisements and to give an extended explanation of the 6% Plan (R. 25, 26, 749, 750).

Immediately following the reference to the 6% Plan, the advertisement features in prominent and distinctive display a statement illustrating the computation process involved as a simple matter of (A) taking the unpaid balance, (B) adding the cost of insurance and (C) multiplying by 6%, resulting in the *whole* financing cost, with no extras, no service fees and no other charges (R. 749). This is followed in later text, by the statement that the financing cost of 6% "is not 6% interest, but simply a convenient multiplier anyone can use and understand" (R. 750).

That those advertisements spoke the truth is not in question; they stated what the 6% cost was and what it was not. The Circuit Court of Appeals, however, rejected GMAC's contention that, having painstakingly and truthfully told the public that it was a simple arithmetical process of multiplying the amount of unpaid balance by 6% and *that it was not interest*, GMAC had discharged its obligations with respect to fair representation and was not accountable for any impression contrary to and not warranted by the language of the statements contained in the advertisements. In effect the Circuit Court of Appeals held GMAC to the same responsibility as falls upon one who makes a *false* statement which deceives or misleads only the trusting or unwary (R. 754).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred in holding (1) that GMAC was engaged in commerce within the

meaning of the Federal Trade Commission Act, and (2) that GMAC's advertising constituted an unfair method of competition subject to an order to cease and desist under the Federal Trade Commission Act.

Reasons for Granting the Writ.

1. Each of the questions presented is one of public importance which should be decided by this Court.

As to the first, the decision below results in a new concept of interstate commerce for which there is no authority. A question involving an extension of the Federal Trade Commission's jurisdiction to exercise its regulatory power beyond the limits of interstate commerce as previously established warrants an authoritative decision by this Court. It is important in its nature as well as its scope.

It is submitted that it is of no less public importance that the decision below makes for a distinction which results in one corporation such as GMAC being in commerce subject to the jurisdiction of the Federal Trade Commission, and a competitor finance company not. The distinction is based solely on the fact that the capital stock of one of the two corporations competitively engaged in the same business is owned by the manufacturer in commerce and the stock of the other is not, notwithstanding that both may be in all other respects similarly connected with the manufacturer's business to the extent they purchase instalment sale contracts from dealers in the manufacturer's products, and thereby may have some economic influence on the wholesale business. It is a matter of public concern whether a determination of the question of commerce sufficient to give jurisdic-

tion to the Commission shall be permitted to remain on such a basis.

If the decision below on the second question presented is correct, it means an extension of the scope of the Federal Trade Commission's regulatory power. It departs from established standards for determining whether a statement such as an advertisement is an unfair practice by reducing the question to the single test of the possibility of misleading the ignorant, careless or trusting, without regard to truth or falsity of the statemem. This goes farther, in the direction of protecting the ignorant or the unwary or those who can but will not read or understand, than this Court did in *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112.

In that case, it was against a *false* statement that this Court protected the trusting and ignorant. Recognizing that a false statement may be misleading, no matter how obviously false it is, this Court refused to allow an escape from responsibility for a statement which, being false, is deceiving, except to those who are capable of seeing through it.

That is not a principle standing for protection against a *truthful* statement which cannot be misleading except as a result of ignorance, indifference or perversion of the meaning of the statement. It is a question worthy of this Court's intervention, whether or not protection in the name and behalf of the ignorant or careless shall go as far as to permit the Federal Trade Commission to exercise its power with respect to a statement which is truthful, informative and comprehensible, and to make the measure of an unfair method no longer the falsity of an advertising statement or similar practice.

2. The decision below is inconsistent, where not in conflict, with other decisions involving the question of interstate commerce.

It purports to treat as interstate commerce that which functionally is not commerce by transforming it into an instrumentality in the flow of the commerce represented by the General Motors manufacturing business or distribution to dealers at wholesale.

Even if an activity, such as financing, which is not commerce could be converted into commerce subject to the Federal Trade Commission's jurisdiction by reason of some relationship to an activity in interstate commerce, the attempt in this instance to push a finance business into the flow or current of commerce runs counter to the decisions on that phase of the commerce question. The decisions declare and emphasize the necessity that there be a close, intimate and direct relationship with and effect on the interstate commerce, and, generally speaking, they deal with situations where the question relates to the effect of an activity which, separately considered, is not interstate commerce because it is local or intrastate, rather than because it is not commerce in a functional sense. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *Burco, Inc.* v. *Whitworth,* 81 F. (2d) 721, 737 (C. C. A. 4); *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673, 684 (C. C. A. 8); *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1.

According to the principle in those decisions, an indirect or unobstructive relationship or the mere fact that it has the capacity of aiding or assisting the activity in commerce are not enough to bring an

activity within the reach of Federal power as interstate commerce; something more is required to bring about the necessary effect than that it is allied in some manner, whether by stock relationship or other business interest, either with the unified plan of the General Motors business or industry in general. It is inconsistent with those decisions to consider as interstate commerce a business which, apart from its place in the General Motors scheme of things or in the economic scene, does not affect the interstate commerce represented by the General Motors activity in manufacturing or wholesale distribution to dealers, since it functions only in relation to the instalment sale contracts acquired by the local retail dealers, not only after the products have come to rest with the dealers, but also after the dealers' retail sales locally.

The decision below proves further to be inconsistent with other decisions if the test applied is the assistance the finance business is deemed to render the wholesale business in promoting the ultimate retail sale of the manufacturer's products. If General Motors itself conducted the same finance business along with and as an aid to its regular activities which constitute commerce, then, by the principle that "the nature of the act, not the person of the actor" is decisive and that the character of the business of a single corporation conducting several types of activities must be determined by the particular transactions involved, it would retain its character and would not be transformed into commerce even though managed and living directly under the same roof as the other type of business. *Puget Sound Co.* v. *Tax Commission,* 302 U. S. 90; *Foster & Kleiser Co.*

v. *Special Site Sign Co.,* 85 F. (2d) 742, cert. denied 299 U. S. 613. In a reverse situation, where the proposition involved the status of the holding company, as part of the question whether a holding company could resist federal power to forbid the use of mails or the facilities of interstate commerce under the Public Utility Act, this Court pointed out that it is "the substance of what they do, and not the form in which they clothe their transactions, which must afford the test", so that conducting "such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power". (*Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 440).

By employing a principle inconsistent with the one just referred to, the decision below produces the anomalous result that GMAC is held to be in commerce as a consequence of considering its business as a promotional agency under the General Motors unified plan of selling and financing, although the finance activity would not be commerce if conducted by General Motors itself. In other words, because the relationship between the two corporations is sought to be used with the limited purpose of affecting the finance business with the attributes of commerce, it becomes unnecessary to give particular consideration to the principle of keeping clear the distinction between two corporations, each "amenable as such to governmental authority" where there is no question "of the abuse of intercorporate relations, or of domination or control affecting the integrity of the direction of the affairs". *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 152.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

New York, N. Y., December 10, 1940.

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CITATIONS

284000—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 619

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 747) is reported in 114 F. (2d) 33.

JURISDICTION

The decree of the Circuit Court of Appeals was entered September 13, 1940 (R. 757–759). Petition for writ of certiorari was filed December 12, 1940. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission

Act, c. 311, 38 Stat. 719 (15 U. S. C., sec. 45), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission is authorized to prohibit not only General Motors Corporation but also a subsidiary thereof engaged solely in financing, from promoting the interstate sale and distribution of General Motors cars by means of misleading representations concerning a plan for financing retail purchases, on credit, of General Motors cars.

2. Whether the unfair methods of competition in commerce which the Commission is authorized to prohibit include representations (made in promoting interstate sales) which are not inherently false but which are calculated to mislead, and do mislead, a substantial part of the purchasing public.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719 (15 U. S. C., sec. 45), provides in part as follows:[1]

> That unfair methods of competition in commerce are hereby declared unlawful.

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[1] The Commission instituted this proceeding before, but concluded it after, section 5 was amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, sec. 45). The amendments are not pertinent to the questions presented in this case.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

STATEMENT

This case involves the validity of an order of the Federal Trade Commission entered in a proceeding under section 5 of the Federal Trade Commission Act directing petitioners to cease and desist from making certain representations which the Commission found to be misleading concerning a plan for financing retail purchases of General Motors cars. Petitioners are General Motors Corporation (referred to herein as General Motors), and two of its wholly owned subsidiaries, General Motors Sales Corporation and General Motors Acceptance Corporation (referred to herein, respectively, as the Sales Corporation and GMAC). The Commission based its order on detailed findings of fact which may be summarized as follows:[2]

General Motors manufactures various makes of automobiles but it does not itself sell these cars either to dealers or to the general public (R. 19–20). At the time the Commission issued its complaint General Motors sold the cars manufactured by it

[2] The petition for writ of certiorari does not question the sufficiency of the evidence to support the Commission's findings.

to five completely owned subsidiary corporations [3] whose sole function consisted in selling and shipping these cars to dealers for resale by the dealers to the general public (R. 20, 22). Following the incorporation of the Sales Corporation in 1936 as a wholly owned subsidiary of General Motors, the five former subsidiary selling corporations were dissolved and the Sales Corporation acquired all of their assets and assumed and carried out all of their functions as selling agents for General Motors (R. 21).

The relationship between the Sales Corporation and the dealers to whom it sells is established by contract (R. 23). The contract, which is subject to cancellation on short notice, outlines generally the way in which the dealer shall conduct his business and the manner in which he may purchase and sell the type of car in which he is authorized to deal (R. 23–24). The authorized dealers in General Motors cars, of whom there are several thousand located throughout the United States, are aided in the resale of General Motors cars to the public by the entire corps of General Motors subsidiaries, including the Sales Corporation and GMAC (R. 22).

GMAC, which was incorporated in 1919, was organized by General Motors for the purpose of

[3] Chevrolet Motor Company, Olds Motor Works, Pontiac Motor Company, Buick Motor Company, and Cadillac Motor Car Company (R. 20).

extending credit to its dealers and for the purpose of financing retail purchases of its cars on credit (R. 21). When a retail customer purchases a General Motors car on credit, he executes a conditional sales contract, chattel mortgage, or other credit device, providing for discharge of his indebtedness in monthly installments, usually 12, 18, or 24 in number (R. 24). The dealer is at liberty to assign the purchaser's contract to GMAC if the contract is acceptable to it and receives the approximate value thereof, and GMAC thereupon collects the monthly installments from the retail purchaser as the installments become due (R. 22). GMAC performs this financing function exclusively in connection with sales of General Motors cars negotiated by General Motors authorized dealers, except that it finances used cars of other makes taken by these dealers in trade (*ibid.*).

In the fall of 1935 General Motors, through its various subsidiaries, announced a new plan for financing the purchase of its cars, the plan being described as the "6%" or "Six Per Cent" plan (R. 24). The plan was widely advertised in newspapers of general circulation published on October 2, 1935 (R. 24–25). Under the plan the amount paid by the purchaser is determined by adding the unpaid balance of the purchase price and the cost of insurance and multiplying the sum of these two items by 6% if payment is to be made in 12 monthly installments and by one-half of 1% per month if

payment is to be made in more or less than 12 months (R. 25, 29).[4] The purchaser pays the total amount due from him, as thus determined, in equal monthly installments (*ib.*). The purchaser is therefore charged 6%, 9%, or 12% (depending on the number of his monthly payments) on the amount of his original indebtedness although this indebtedness does not remain outstanding during the period of the contract but is reduced by each monthly payment and the financing charge paid by the purchaser is approximately twice the amount of interest at 6% per annum on the monthly declining balance of the purchaser's indebtedness (R. 29–30).

In the advertisement of October 2, 1935, this method of financing was described as "a new 6% Plan" (R. 25). The advertisement stated that the plan considerably reduced the cost of financing car purchases and that it "provides for convenient time payments of the unpaid balance on your car—including cost of insurance *and a financing cost of 6%*" (*ib.*).[5] It stated that the plan "is not 6% interest, but simply a convenient multiplier anyone can use and understand", but most of the later advertisements dealing with the plan did not explain its provisions and confined themselves to a short reference to the "6%" plan (R. 25, 26). Typical

[4] For example, if payment is to be made in 24 monthly installments, the multiplier is 12%; if in 18 monthly installments, the multiplier is 9% (R. 29).

[5] Italics ours.

references to it in these advertisements (R. 26–27) are set forth below.[6] The "6%" plan was also highly publicized by the use of billboards and window posters, many of which featured the symbol "6%" in a size far greater than most of the other lettering (R. 27).

Some of this advertising was published and paid for by GMAC and some of it was published and paid for by General Motors' five selling subsidiaries (R. 26, 27).

The foregoing advertising not only tended to mislead, but actually did mislead, a substantial part of the purchasing public into the erroneous belief that the "6%" finance plan contemplates a simple interest charge of 6% per annum upon the deferred and unpaid balance of the purchase price (R. 31–32). It caused and tended to cause the public to buy General Motors cars because of this erroneous belief (R. 31–32). Its purpose was to promote the sale of General Motors cars and it had this effect (R. 27, 30).

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[6] Compare Chevrolet's low delivered prices and the new, greatly reduced GMAC 6% Time Payment Plan.

All Pontiac cars can be bought on GMAC's new 6% Plan which greatly reduces the cost of buying on time.

The new GMAC 6% Time Payment Plan not only simplifies financing but actually cuts the cost of buying a car on time.

New 6% GMAC Time Payment Plan.

Available on GMAC's new 6% Time Payment Plan.

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The announcement and use of the "6%" plan gave General Motors such a competitive advantage that by the middle of January 1936 all of its principal competitors [7] were forced to announce similar "6%" financing plans (R. 28). The Commission issued complaints against these competitors and all of them except the Ford Motor Company executed agreements during the spring or summer of 1936 to cease and desist from the practices alleged in these complaints (*ib.*). At this time General Motors and its subsidaries discontinued *advertising* the "6%" plan but it and they still use it and they furnish dealers with the necessary contract forms and the tabulation and data requisite to compute charges under the "6%" plan (R. 28–29).

There is a regular flow of commerce in cars manufactured by General Motors from its factories in Michigan to retail purchasers in other States and the advertisement and use of the "6%" plan by GMAC furthered this interstate movement (R. 31).

The order entered by the Commission directs General Motors and "any" subsidiary thereof to cease and desist, in connection with the interstate sale and distribution of motor vehicles, from using the words "six per cent" or the figure "6%" in connection with the cost of any plan for financing

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[7] Chrysler Corporation, Ford Motor Company, Graham-Paige Motors Corporation, Hudson Motor Car Company, Nash Motors Company, Packard Motor Car Company, Reo Motor Car Company.

the purchase of cars on a deferred payment basis, when the financing charge paid by the purchaser exceeds "simple interest at the rate of 6% per annum * * * calculated on the basis of the unpaid balance due as diminished after crediting installments as paid" (R. 34).

The Circuit Court of Appeals unanimously affirmed the Commission's order. It held that since the Commission, having discretion to deal with the matter, had found, "upon substantial evidence," that petitioners' form of advertising resulted in deception of the public, it was not for the courts to revise the Commission's judgment even if, as petitioners contended, the advertising could mislead only the careless or the incompetent (R. 755). It also held that since GMAC was a wholly owned subsidiary of General Motors and "acted as an agent of General Motors in a unified plan of selling and financing cars shipped in interstate commerce", the contention that the Commission was without jurisdiction because GMAC was not itself engaged in interstate commerce was without merit (R. 756).

ARGUMENT

I

We submit that the decision below upholding the Commission's order against GMAC presents no novel or unsettled question as to the construction or application of the Federal Trade Commission

Act. Assuming, as petitioners contend, that the financing activities of GMAC do not constitute either commerce or interstate commerce, this is irrelevant. The statute declares unfair methods of competition in commerce to be unlawful. In order to come within this prohibition, there must be competition in interstate commerce promoted or furthered by unfair methods, but it is settled beyond any doubt that the unfair competitive methods need not themselves constitute interstate commerce. Gambling is not interstate commerce but promoting interstate sales by an appeal to the gambling instinct of the ultimate retail purchaser is a violation of the act. *Federal Trade Commission* v. *Keppel & Bro., Inc.,* 291 U. S. 304. Manufacture is not interstate commerce but use by the seller of a trade or corporate name which tends to cause purchasers to believe that the seller itself manufactures the product which it purveys is a violation of the act. *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212.

In the instant case the competition in commerce is the competitive interstate sale and distribution of automobiles and the unfair methods used in this competition are the deceptive representations made as to the nature of the credit terms offered purchasers of General Motors cars. When a product such as automobiles is sold to the purchasing public on credit, or partly on credit, misrepresentation as to the terms upon which credit is offered to

purchasers has exactly the same competitive effect as a misrepresentation as to price.[8] The act is violated because the deceptive statements made by General Motors and its subsidiaries concerning the "6%" finance plan unfairly promoted interstate trade in General Motors cars, to the injury of competitors.

The gist of petitioners' contention seems to be: (1) the Commission is authorized to issue an order only against one who uses unfair methods of competition in interstate commerce, (2) since GMAC does not sell or distribute automobiles, it was not a party to the competition in commerce involved in the present proceeding, and (3) the Commission therefore lacked authority to enter an order against GMAC.

In answering this contention, it is sufficient to point out that it ignores the decisive fact that GMAC was the mere agent or instrumentality of General Motors. The Commission, having found that General Motors had been using unfair methods of competition in commerce through the instrumentality (in part) of its controlled subsidiary GMAC, was authorized to include GMAC in the order against General Motors for the purpose of preventing possible evasion of the order by General Motors through the medium of this same instrumentality.

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[8] Misrepresentation as to price is one of the most obvious and flagrant methods of unfair competition. See *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 114–117.

General Motors did not itself publish any representations, deceptive or otherwise, concerning the "6%" finance plan but it made such representations through certain wholly owned corporations (GMAC and General Motors' five selling subsidiaries). A corporation may, of course, make deceptive representations (constituting unfair methods of competition) through the instrumentality of a subsidiary, just as a corporation may engage in interstate commerce "through the instrumentality of subsidiaries" (*Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 440). General Motors engaged in unfair methods of competition because the acts of its controlled subsidiaries (including GMAC) were its acts. Likewise, if General Motors should in the future continue, through the medium of GMAC, the practices prohibited by the Commission's order against General Motors, this would constitute a violation of the order.

Since the Commission's order would, in effect, be binding upon GMAC even if GMAC had not been expressly included in the order,[9] the Commis-

[9] It is significant that the Commission's order runs against "any" subsidiary of General Motors. The order (R. 34) provides that "the respondent General Motors Corporation, directly or through its subsidiary, General Motors Sales Corporation, *or any other subsidiary*, and respondent General Motors Acceptance Corporation, their respective officers, representatives, agents, and employees * * * do forthwith cease and desist * * *." (Italics ours.)

sion was clearly authorized to make explicit the prohibitions implicit in its order against General Motors. Moreover, the Commission was authorized to enter an effective order of prohibition and including GMAC in the order tends to simplify enforcement of the order against General Motors and to prevent possible evasion of this order. This Court has held that the power conferred upon the Commission to prohibit unfair methods of competition authorizes it to enter an effective order and that it may include in its order, where the circumstances show this to be a reasonable means of preventing evasion, persons who were not shown to have participated in the unfair methods of competition against which the order is directed. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 119–120, *supra.*

In the case just cited all of the stock of the Standard Education Society was owned by three individuals, each of whom was also an officer of the Society. After the Commission had filed a complaint against the Society under section 5 of the Federal Trade Commission Act, the three stockholders organized a second corporation for the purpose of evading any order which the Commission might issue against the Society. The Commission, having issued a supplemental complaint making the three stockholders and the second corporation respondents, entered an order against the two corporations and the three

stockholder-officers. On review, the Circuit Court of Appeals held that the Commission could issue an order against the individuals only in so far as the evidence tended to implicate them in the unfair methods of competition employed by the corporate respondents, and, applying this principle, it set aside the order as against one individual respondent and set the order aside in part as against the other two.[10] This Court held that the Commission's order should be reinstated in full against the individual respondents. It pointed out (p. 120) that the Commission was justified in reaching the conclusion that it was necessary to include the individual respondents in its order if the order "was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist." It also said (p. 119):

> Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

II

One of the questions presented in the writ of certiorari is whether the Commission is authorized

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[10] *Federal Trade Commission* v. *Standard Education Society*, 86 F. (2d) 692, 695, 697–698 (C. C. A. 2d, 1936).

to prevent the use of statements which, while they may mislead the trusting or ignorant, are "true as well as reasonably informative." We submit that no such question is presented in this case since petitioners' statements were neither "reasonably informative" nor "true."

Much of petitioners' advertising exploited, without any explanatory statement, what was described as a new "6% Plan" or "6% Time Payment Plan" (*supra*, pp. 6–7). Clearly this was not "reasonably informative." Neither can it be properly characterized as "true." Its truthfulness depends upon what the general public understands a "6% Plan" to mean, as used with reference to a plan for installment payments by customers buying on credit. So tested, petitioners' statements were not true since a substantial part of the purchasing public understood that "6%," when used in this connection, meant an interest charge of 6% on the purchasers' indebtedness as reduced by his monthly installment payments (R. 31–32).

The case does present the question whether promotion of interstate trade by statements not inherently false but resulting in wide deception of purchasers constitutes an "unfair" method of competition, but this question is neither novel nor unsettled. It is, moreover, settled adversely to petitioners.

Most of the misleading advertising and representations against which the Commission has issued cease and desist orders have not been inherently false.[11] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, represents a typical proceeding of this kind. In that case the Commission found that respondents' product was improperly designated "white pine" and that use of this designation therefore constituted an "unfair" method of competition. The Circuit Court of Appeals held that there was no evidence to support the Commission's finding that this designation was improper and set aside the Commission's order. This Court recognized that there was conflicting evidence on the issue of misrepresentation but held that the Commission's findings, being supported by evidence, must be accepted since the courts are not authorized to determine the facts on the basis of their own independent appraisal of the testimony.

Plainly in the *Algoma* case respondents' designation of their product, while deceptive, was not inherently false. Respondents and others similarly circumstanced had used the designation in question for more than 30 years and its general

[11] There is, it would seem, little inducement to make inherently false statements, both because they are not likely to carry conviction and because of the damaging effect upon the seller if their falsity is exposed.

currency was recognized in a report on simplified trade practices published by the Bureau of Standards of the Department of Commerce (*Federal Trade Commission* v. *Algoma Lumber Co., supra,* at pp. 74, 79). The test which this Court said (p. 81) should be applied in determining whether a representation, made in competition in interstate commerce, was "unfair" was its "capacity to deceive," not whether it constitutes "fraud as understood in courts of law."

The petition for writ of certiorari assumes that petitioners' statements deceive only the careless or ignorant. Petitioners make no showing that the evidence establishes that the deceptive effect of their statements was so limited, but even if petitioners' factual assumption be accepted as sound, it constitutes no defense. The statutory prohibition of unfair methods of competition includes unfair competitive methods which avail to capture the trade of only the ignorant or gullible. *Federal Trade Commission* v. *Standard Education Society, supra,* at p. 116. As the Court there said, "Laws are made to protect the trusting as well as the suspicious."

CONCLUSION

The decision below is clearly correct and it presents no conflict and no unsettled question of statutory interpretation. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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